

State of Minnesota, by the  
Minnesota Pollution Control  
Agency,

Plaintiff,

and

City of St. Louis Park,

Intervenor-Plaintiff,

vs.

Reilly Tar & Chemical  
Corporation,

Defendant.

US EPA RECORDS CENTER REGION 5



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ORDER

File No. 670767

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MPCA  
ATTORNEY GENERAL

The above-entitled matter came on for hearing before the undersigned, one of the judges of the above-named Court, on June 22, 1978, on a motion by the State of Minnesota Pollution Control Agency seeking an order for leave to amend its complaint and on a motion by the City of St. Louis Park seeking to intervene as a plaintiff therein. Reilly Tar & Chemical Corporation appeared in opposition to challenge the jurisdiction of the Court, and to oppose the motions of the State and the City. Furthermore, Reilly sought an order dismissing this action MUNC PRO TUNC pursuant to a settlement of this action in 1972, or for other relief in the alternative.

Appearing for the State of Minnesota were Special Assistant Attorneys General John-Mark Stensvaag and Robert C. Moilanen; appearing for the City of St. Louis Park were Wayne G. Popham, Esq. and Allen Hinderaker, Esq. and appearing for Reilly Tar & Chemical Corporation were Thomas E. Reiersgord, Esq., William Egan, Esq. and Timothy Thornton, Esq.

The Court having heard the arguments of counsel and upon all of the files, records, memoranda, and proceedings herein, and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED:

1. That the motion by the State of Minnesota to amend its complaint is granted.

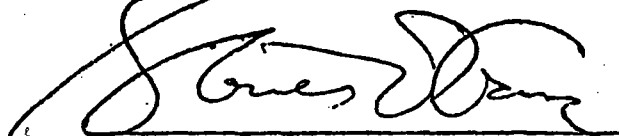
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2. That the motion of the City of St. Louis Park to intervene is granted.

3. That the motion of Reilly Tar & Chemical Corporation to dismiss this action is denied.

4. That the motion of Reilly Tar & Chemical Corporation to substitute the City of St. Louis Park as the sole defendant is denied.

BY THE COURT:

  
Judge

DATED:

September 1<sup>st</sup>, 1978.

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MEMORANDUM

I.

This matter came on for hearing of four different motions. The first is a motion by plaintiff (hereinafter, "State") seeking leave of the Court to amend its original complaint in the action. The second motion is a motion to dismiss brought by defendant (hereinafter, "Reilly Tar"). The third is a motion by Reilly Tar seeking to substitute the City of St. Louis Park (hereinafter, "City") as the sole defendant in the case. The final motion is the City's motion to intervene.

All parties to the motions have extensively briefed their positions on these motions. The facts giving rise to the motions are set forth in great length in the various memoranda of law submitted to the Court. The Court will not attempt to summarize these facts at this point but will refer to specific facts as they are germane to the various issues. At the outset, however, the Court would note that the so-called "statements of facts" by the parties contain a multitude of contradictions; this in itself is indicative of the inappropriateness of any summary disposition of this matter and the necessity of proceeding to a full hearing on the merits.

II.

The State's motion to amend its complaint and Reilly Tar's motion for dismissal will be discussed together because these motions include many common issues and arguments. Specifically, Reilly Tar's arguments in favor of dismissal are basically the same as its arguments in opposition to amendment. This is not to say that the issues are identical, but for the sake of convenience and clarity they will be discussed together.

The Court must start from the proposition that the law favors granting leave to amend a complaint. Minnesota Rule of Civil Procedure 15.01 specifically provides that "leave shall be freely given when justice so requires." This provision has been explained as follows:

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In this context, justice requires the presentation of the claim or defense on the merits. As such, unless prejudice going to the merits has been established, the amendment should be permitted. The purpose for permitting amendment of pleadings is to permit a party to correct errors or omission in his statement of claim or defense. Generally, it is immaterial whether the omission or error involved matters that were known to the pleader at the time of the original pleading or were discovered after the service of the original pleading. Hetland and Adamson, Minnesota Practice, vol. 1, p. 516.

The Court feels that, absent any "prejudice going to the merits," the interests of justice require the granting of the State's motion. The new allegations and claims of the State arise out of the same factual background as did those of the original complaint. There is ample support for the State's claim that at the time of the original complaint, the full extent of the alleged damages was not known and that the proposed amendments are a result of newly discovered evidence. This would appear to be the type of situation contemplated by the framers of the Rules. There can be no doubt that it is in the interests of justice -- and, not incidentally, in the public interest -- to allow all claims and defenses arising out of a common factual background to be brought together in the same action. To do otherwise would be to invite both unfair results and piecemeal litigation.

The Court is aware, however, that even though granting leave to amend for the above-stated reasons might at first blush appear to be in the best interests of justice, the possibility of prejudice to the non-moving party might be so great that it would be a disservice to that interest to allow the amendments. In this regard, Reilly Tar has interposed several objections, most of which objections are also the basis for Reilly Tar's motion to dismiss. Before discussing these objections, it should be noted that Reilly Tar contends that in determining whether to grant leave to amend, the Court should consider the legal sufficiency and merits of the proposed amendments. The State, on the other hand, argues that leave to amend should be denied only if the proposed amendment is "frivolous on its face." This Court feels that the law

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Minnesota is not entirely clear in this regard. It is clear, however, that in considering Reilly Tar's motion to dismiss, which in many respects is like a motion for summary judgment, the Court does have to inquire into the merits of the reasons for which dismissal is sought. Because the objections to the proposed amendments and the reasons in support of dismissal often overlap, it would be more efficient to analyze each according to the same standards. The Court will therefore assume that our law requires the Court to consider the legal sufficiency and merits of the proposed amendments. This standard is admittedly stricter than a "trivial on its face" standard and utilization of it will better guarantee that Reilly Tar is not unduly prejudiced by the proposed amendments if leave to amend is granted.

Reilly Tar first argues that the proposed amendments lack merit and the suit should be dismissed on grounds of res judicata, collateral estoppel, and promissory estoppel. Reilly Tar contends that the State is barred from bringing any action against Reilly Tar because the parties entered into a "settlement" in 1972 and that the terms of the "settlement" provided that the original action would be dropped and the State would take no more action against Reilly Tar. Obviously, if there were such a settlement, Reilly Tar should prevail. The State, however, vigorously disputes the existence of any such settlement and further contends that Reilly Tar was specifically informed in 1972 that the State would not agree to any such settlement. Clearly, there is a factual issue here that cannot be resolved on the basis of memoranda and affidavits. Only a trier of fact can determine if there was a settlement; thus, this Court cannot at this time say that the amendments lack merit or the suit should be dismissed because of the existence of such a settlement. Reilly Tar's allegations are more properly defenses to be asserted at trial.

Reilly Tar next contends that its motion should be granted and the State's denied because the statute of limitations has run on the various claims of the State. The State denies this, chiefly on the basis that Reilly Tar's activities constitute a "continuing nuisance" and that the statute of limitations is no bar

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as long as damages continue to occur. Again, there are factual issues here that cannot be determined at this stage of the proceedings. For example, it must be determined when the alleged damages occurred and whether the nature of Reilly Tar's activities was such as to constitute a continuing nuisance. Only after such determinations can it be concluded whether or not the State's claims are barred by the statute of limitations. Thus, this contention of Reilly Tar is also a defense to the State's claims, the merits of which should be determined by a trier of fact.

Reilly Tar argues further that leave to amend should be denied because at the time of filing the original complaint the State was aware of the evidence on which the proposed amendments are founded. In view of the extensive investigations carried out by the State after the original complaint was filed, the Court seriously doubts the validity of Reilly Tar's allegation. In any event, this too presents an issue of material fact, namely, the determination of what evidence was available to the State when this action was commenced. Even if it could be determined at this point what evidence was available to the State, this would not be sufficient grounds for denying leave to amend since, as the commentators have noted,

Generally, it is immaterial whether the omission or error involved matters that were known to the pleader at the time of the original pleading or were discovered after the service of the original pleading. Hetland and Adamson, Minnesota Practice, vol. 1, p. 516.

Reilly Tar's next argument is that the State's motion to amend should be denied because it has been brought in bad faith. In so alleging, Reilly Tar contends that the State inexcusably delayed in bringing its motion, that the State has failed to join certain real parties in interest, and that an affidavit by the Director of the Pollution Control Agency is lacking in foundation and contains misrepresentations. The question of delay will be discussed at some length later in this Memorandum; at this point, the Court would note that any determination of whether there was an unreasonable and/or inexcusable delay depends on the determination of certain factual questions and it is thus impossible to now conclude

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that there was a bad faith delay by the State. As to the allegation regarding joinder of real parties in interest, there is a factual question as to whether they are indeed real parties in interest. Even if it could be determined that they are real parties in interest, there is no showing that the State's failure to name them amounts to bad faith. Reilly Tar has sufficient remedies under the Rules to bring in what it considers a real party in interest. Finally, the Court finds no merit whatsoever in Reilly Tar's contention that Ms. Gardebring's affidavit lacks foundation and contains misrepresentations; indeed, this allegation itself is indicative of the vast differences in what each party believes the "facts" of this case to be.

Reilly Tar's most serious objection is that it will be unduly prejudiced if this Court does not dismiss the action and allows the State to amend its complaint. It is certainly possible, as Reilly Tar contends, that because eight years have elapsed since this suit was initiated, some evidence may be lost or destroyed and some witnesses may be unavailable or unable to remember fully what transpired several years ago. Such is inevitable whenever there has been a lapse of time. The law is clear, however, that "prejudice should not be presumed or inferred from the mere fact of delay." Firoved v. General Motors Corp. 277 Minn. 278, 284, 152 N.W.2d 364 (1967). In the instant case, there is no showing at this point as to the importance of evidence that may be unavailable; nor has there been a showing that the evidence is unavailable solely as a result of the State's delay. Indeed, Reilly Tar has stated that some records may have been destroyed in reliance on the alleged "settlement" with the State; certainly if it were to be found that there had been no settlement, Reilly Tar could not be heard to complain of prejudice which it brought on itself. For these reasons, Reilly Tar's objections appear premature. Additionally, our Supreme Court has stated that one of the standards by which to determine whether a suit should be dismissed because of prejudice due to delay is

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...whether the lapse of time has made it difficult to ascertain the facts so that a substantial chance of arriving at an erroneous decision exists. Knox v. Knox, 222 Minn. 477, 486, 25 N.W.2d 225 (1946) (emphasis added)

Since at this stage of the proceedings neither the extent nor the nature of unavailable evidence is known, this Court cannot determine that there is "a substantial chance of arriving at an erroneous decision." There is thus no showing that Reilly Tar will be prejudiced in this regard.

Reilly Tar further objects that it will be prejudiced by an allowance of the proposed amendments because the amendments add new claims and seek new damages from Reilly Tar. This argument is without merit. The very purpose behind our Rules' provision that liberal amendment of pleadings should be allowed would be defeated if it were held that any such amendment could not subject a party to additional liability. This is not a case where the proposed amendments come at such a time so as to make it difficult or impossible for Reilly Tar to prepare a defense to the additional allegations. No trial date has been set and Reilly Tar will have ample time to prepare its defense. A party is not prejudiced simply because it is alleged that he is liable to another party for his actions; were this the case, all lawsuits would be dismissed.

Additionally, Reilly Tar argues that it relied on the alleged settlement in selling its property at a "discount," and that it would now be prejudicial to allow the State to continue its suit against Reilly Tar. Clearly, this argument is premised on the proposition that a settlement was reached between the parties; that, however, is a factual determination that cannot be made now and the argument therefore fails.

The Court thus finds that there is no showing that Reilly Tar will be unduly prejudiced if the State is granted leave to amend its complaint. Additionally, it is certainly in the public interest that leave to amend be granted. The State has in good faith alleged that substantial damages to a public water supply

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have occurred; it is unquestionably for the good of the public that it be determined who, if anyone, should be held liable for the alleged damages. Amendment is therefore proper under Rule 15.01.

The allowance of the amendments will not work so as to improperly extend the jurisdiction of this Court. It is undisputed that this Court obtained both personal and subject matter jurisdiction when the original complaint was served in 1970. It is also undisputed that there has never been a final judgment entered in this case. Reilly Tar argues, however, that the Court lost its jurisdiction over the case when the alleged "settlement" was reached in 1972. This begs the issue. It remains a factual issue whether any such settlement was reached. Only after this is determined can it be determined if the Court has lost jurisdiction. The Court agrees with Reilly Tar's statement that jurisdiction is a threshold question in this case; however, that question may only be answered if the facts are not in dispute or if the trier of fact has made a finding after all evidence has been presented. Until it can be conclusively determined that the original cause of action was brought to judgment or settled, this Court retains its jurisdiction. Thus, the proposed amendments to the complaint having been found to be proper in all other respects, the Court has not extended its jurisdiction by granting leave to amend.

As has been noted, most of the above arguments are in support of Reilly Tar's motion to dismiss as well as in opposition to the State's motion to amend. For the same reasons that those arguments fail to provide reason to deny the motion to amend, they also fail to provide reason to dismiss the suit. It is obvious that at this stage of the proceedings, this case is fraught with issues as to material facts; for this reason alone, Reilly Tar's motion to dismiss should be denied. Reilly Tar argues additionally, however, that there should be a dismissal because of failure to prosecute and laches on the part of the State. The essence of both of these allegations is that the State has unreasonably delayed in

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pursuing this action. Obviously there has been some delay in this action, but a determination of whether that delay is unreasonable is a factual determination that cannot be made at this point. The "evidence" is contradictory as to why the State did not proceed more rapidly and as to when the State obtained the information necessary to proceed in its prosecution of the action. These, among others, are questions for the trier of fact. In any event, this Court has grave doubts that the defense of laches -- and also failure to prosecute, since failure to prosecute is only an aspect of the laches doctrine -- may be asserted against the State in this action. Minnesota case law holds that laches may not be asserted against the State in a civil action when it is acting in its public, governmental, or sovereign capacity, but laches may be asserted when the State is acting in its proprietary capacity. See, e.g., State v. Brooks, 183 Minn. 251, 236 N.W. 316 (1931). Although it would appear at this point that this action falls into the former category, the facts are not so undisputed that the Court can conclude this as a matter of law.

In summary, the Court feels that chiefly because of the many factual issues still unresolved, the State should be allowed to proceed with its action and to amend its complaint. After more evidence is adduced through discovery and trial, it may be found that any or all of the various objections of Reilly Tar have merit and an appropriate remedy may then be afforded to Reilly Tar. At this stage, however, it would be entirely inappropriate for this Court to issue any order that would have the effect of denying or limiting the opportunity of having all issues in this case brought before a trier of fact.

### III.

The third motion before the Court is the City's motion to intervene. The Court believes that the City is entitled to intervene under the provisions of either M.R. Civ. P. 24.01 or 24.02. Rule 24.01 provides for intervention as a matter of right

...when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest...

There can be no doubt that intervention is warranted under this Rule since the property in question is in St. Louis Park and since the City has the responsibility to protect the interests of its citizens in respect to that property. Additionally, the City is entitled to intervention to protect any interest it may have acquired as a result of previous "negotiations" in this case.

Intervention is also proper under Rule 24.02 which provides for permissive intervention

...when an applicant's claim or defense and the main action have a question of law or fact in common.

Again, there can be no doubt that the City's claims, and especially its request for declaratory judgment on the "hold-harmless" agreement, arise out of the same factual background as the claims in the main action and involve common questions of law.

#### IV.

The final motion before the Court is Reilly Tar's motion to substitute the City as the sole defendant in this case. Reilly Tar argues that its motion should be granted because it entered into an agreement with the City whereby the City agreed to hold harmless Reilly Tar from any actions regarding the property in question. This motion must be denied for several reasons.

First, the effect of granting this motion would be to grant summary judgment to Reilly Tar and since there are genuine issues as to material facts, the motion should be denied. For example, there is still a fact question as to the scope of any agreement between the City and Reilly Tar. It will have to be

determined if there may have been a mutual mistake as to an essential element of the agreement, namely, whether the full extent of the damages was known at the time of the agreement. Under facts quite similar to those alleged in the present case, the Federal District Court of Minnesota and the Eighth Circuit Court of Appeals have both found that an agreement to protect a party from legal action in a pollution case may be rescinded if it is found that new evidence as to the extent and type of damage has surfaced after the agreement was executed by the parties. See United States v. Reserve Mining Co., 394 F. Supp. 233 (D. Minn. 1974), modified and affirmed sub. nom., Reserve Mining Company v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975).

Second, assuming that the agreement is found to be valid, there is still a factual issue as to what the parties intended the "practical effect" of the agreement to be. Specifically, did the parties intend that the City would literally take on the defense of any actions brought against Reilly Tar? or did they merely intend that Reilly Tar remain responsible for defending any actions but have a right of indemnification against the City?

Finally, the Court sees practical difficulties in substituting the City as the sole defendant. Reilly Tar's activities, not those of the City, are the main subject matter of this lawsuit; obviously, Reilly Tar knows much more about those activities, and is thus in a better position to defend them, than is the City. More importantly, substitution of the City as the sole defendant would place the City in an untenable position: contrary to its delegated duty as guardian of the public interest, the City would be forced to act as guardian of the corporate purse.

For all of the above-stated reasons, Reilly Tar's motion to substitute is denied.

#### V.

In conclusion, this Court would again emphasize that there are still many unresolved issues of material fact in this action. After discovery has commenced, it may develop that some facts are not disputed and appropriate motions may then be

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brought. Any summary disposition now of these issues is premature.

LET THIS MEMORANDUM BE MADE PART OF THE WITHIN  
AND FOREGOING ORDER.

S.D.K.

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